Trenergy Infrastructure Sdn Bhd v Hong Leong Bank Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO WA-24NCC-425–09 OF 2024
ATAN MUSTAFFA J
30 JUNE 2025

Banking — Banks and banking business — Cancellation of facilities agreement — Whether fundamental basis of agreement ceased to exist — Whether all future obligations discharged — Whether facilities agreement provided for right of consolidation and set off to survive after cancellation of facility agreement ('clause') — Whether there was a complete severance rather than selective termination — Whether clause in facility agreement allowed extension to secure unrelated third party liabilities after bank's own act of cancelling facilities agreement — Whether event of default existed to entitle bank to exercise rights under clause in facilities agreement after cancellation of facilities

The plaintiff and the defendant ('bank') entered into a facilities agreement ('the facilities agreement') whereby the bank granted the plaintiff banking facilities comprising a revolving contract financing line ('RCFL') in the total sum of RM34,550,000 and a specific contract financing line ('SCFL') in the sum of RM34,211,000 under the sublimit of the RCFL. The RCFL was utilised by the plaintiff as a general credit financing line, whereas the SCFL was utilised for specific contracts with Tenaga Nasional Bhd ('the contracts'). Pursuant to the terms of the facilities agreement, the plaintiff authorised the bank to open an escrow account in the plaintiff's name for the deposit of all proceeds due under the contracts. The plaintiff also authorised the bank to open a fixed deposit account where 8% of the net proceeds of the contracts would be deposited. Sarawak Cable Bhd ('SCB'), initially the sole shareholder of the plaintiff, executed a letter of guarantee in favour of the bank, thus becoming a security party under the facilities agreement. In September 2022, SCB and six subsidiaries, including the plaintiff, applied to the High Court for leave to convene a meeting of creditors to approve a proposed scheme of arrangement ('proposed scheme') and for a restraining order under ss 366 and 368 of the Companies Act 2016. The plaintiff was then informed that this event constituted an event of default, and that the facility would be suspended. Subsequently, the parties reached an agreement where SCB would remove the plaintiff from the proposed scheme. Sometime in December 2023, Bilun Borneo Sdn Bhd ('BBSB') acquired the entire equity interest in the plaintiff from SCB. The plaintiff subsequently wrote to the bank requesting confirmation of the current balance held in the escrow account and fixed deposit accounts, immediate processing of the withdrawal of funds, and release of funds in the escrow account. In this letter, the plaintiff explicitly informed

the bank that it was now wholly owned by BBSB and had completely departed from SCB. The bank, however informed the plaintiff that the facilities granted to the plaintiff (ie, the RCFL and SCFL) were cancelled with immediate effect. Following the cancellation of facilities, the bank informed the plaintiff that despite the cancellation, the bank was purportedly entitled to retain the balance held in the escrow account and fixed deposit accounts pursuant to section 16.04 of the facilities agreement. The bank claimed that since SCB was a security party to the facility, the plaintiff's accounts would be consolidated and/or merged pursuant to section 16.04(b) of the facilities agreement to be set off towards part satisfaction of SCB's liabilities as guarantor for facilities obtained by Leader Cable Industry Bhd ('LCIB') and Universal Cable (Sarawak) Sdn Bhd ('UCSSB'). The plaintiff was also informed that there were sums of RM2,959,218.09 and RM1,596,584.07 in the escrow and fixed deposit accounts respectively ('the plaintiff's monies'). The plaintiff subsequently filed the present originating summons ('OS') seeking a declaration that it was entitled to all rights and interests in the plaintiff's monies on the grounds, inter alia, that: (a) bank's retention of the funds was unlawful following the bank's cancellation of facilities; and (b) it had no outstanding liabilities to the bank at the time of cancellation; and (c) its ownership had changed from the financially distressed SCB to BBSB, effectively severing all connections to the original guarantor. The issues that arose for determination were: (i) whether the banks 's cancellation of the facilities effectively terminated the facilities agreement, thereby discharging all future obligations of the parties; (ii) whether section 16.04 of the facilities agreement, which provided for the right of consolidation and set off, survived the cancellation of facilities; and (iii) whether there was an event of default that would entitle the bank to exercise its rights under section 16.04 of the facilities agreement after the cancellation of facilities.

Held, allowing the plaintiff's originating summons:

(1) The letter from the bank explicitly stated that 'all the facilities granted to Trenergy Infrastructure Sdn Bhd have been cancelled with immediate effect'. The bank's attempt to draw a distinction between the cancellation of facilities and termination of the facilities agreement, arguing that the underlying agreement remained in force was artificial and without substantive merit. The letter made no reservation of any continuing rights under the facilities agreement, nor did it suggest that any obligations would survive the cancellation. A plain reading of the cancellation letter, when considered alongside the bank's earlier correspondence agreeing to remove the plaintiff from the proposed scheme proceedings, indicated a complete severance of the banking relationship rather than a selective termination that would preserve certain contractual rights (see para 30).

(2) The facilities agreement's primary purpose was to provide financing facilities to the plaintiff. Once the bank cancelled these facilities, the fundamental basis of the agreement ceased to exist. It would be commercially absurd to suggest that the facilities agreement continued to exist without the facilities that were its very subject matter. Therefore, the bank's cancellation of facilities effectively terminated the facilities agreement and discharged all future obligations of the parties, including the right of consolidation and set off under section 16.04 of the facilities agreement (see paras 36 & 38).

(3) Section 16.04 was not designed to prevent unjust enrichment arising from nullification of the underlying transaction. Rather, it was a security provision allowing the bank to consolidate accounts and set off liabilities. This provision was directly tied to the operational continuity of the financing relationship and the ongoing provision of banking facilities. Once those facilities were cancelled, the operational relationship ceased, and the provision lost its purpose. Here, the bank sought to apply section 16.04 not to secure the plaintiff's own obligations, but to secure obligations of SCB in respect of facilities granted to entirely different companies (LCIB and UCSSB). Therefore, the bank's reliance on section 16.02 of the facilities agreement was misplaced (see paras 49 & 51).

(4) While section 16.02 provided that securities, liabilities, and obligations created by the agreement shall continue to be valid and binding notwithstanding any change affecting the borrower or security parties, this provision was aimed at ensuring that changes in the borrower's name, style, constitution, or composition did not affect the securities created. It did not address the situation where the bank itself had cancelled the facilities. Therefore, section 16.04 of the facilities agreement did not survive the cancellation of facilities, as it was directly tied to the performance obligations under the agreement (see paras 52–53).

(5) Even if the change in shareholding did constitute an event of default, the bank's cancellation of the facilities was a complete response to this default, effectively terminating the facilities agreement. Having taken this step, the bank could not then seek to exercise rights under the very agreement it had effectively terminated. Therefore, there were no valid events of default that would entitle the bank to exercise its rights under section 16.04 of the facilities agreement after the cancellation of facilities (see paras 65–66).

(6) The primary purpose of the facilities agreement was to provide financing facilities to the plaintiff. All other provisions, including section 16.04, were ancillary to this primary purpose. Section 16.04 could not reasonably be interpreted as intending to create an indefinite security for unrelated third-party liabilities after the principal contract had been terminated by the bank's own act of cancelling the facilities. This would

render section 16.04 a perpetual clause, enforceable years or even decades after the cancellation of facilities, as long as SCB remained indebted to the bank in any capacity. Such an interpretation lacked commercial sense and would lead to lead to the commercial absurdity (see paras 70–73).

(7) It was only after the cancellation of facilities that the bank attempted to exercise its rights under section 16.04. This sequence of events suggested that the bank itself did not initially consider section 16.04 to be operative after the cancellation of facilities. The bank's conduct was inconsistent with its current position that section 16.04 survived the cancellation of facilities and could be enforced in relation to unrelated liabilities of SCB. Therefore, the conduct of the parties supported the conclusion that section 16.04 of the facilities agreement did not survive the cancellation of facilities, especially not for the purpose claimed by the bank (see paras 84–86).

[Bahasa Malaysia summary

Plaintif dan defendan ('bank') telah memasuki satu perjanjian kemudahan ('perjanjian kemudahan') di mana bank telah memberikan plaintif kemudahan perbankan yang terdiri daripada satu revolving contract financing line ('RCFL') berjumlah keseluruhan RM34,550,000 dan satu specific contract financing line ('SCFL') berjumlah RM34,211,000 di bawah subhad RCFL tersebut. RCFL telah digunakan oleh plaintif sebagai garis pembiayaan kredit am, manakala SCFL telah digunakan bagi kontrak-kontrak tertentu dengan Tenaga Nasional Bhd ('kontrak-kontrak'). Selaras dengan terma-terma perjanjian kemudahan tersebut, plaintif telah memberi kuasa kepada bank untuk membuka satu akaun escrow atas nama plaintif bagi tujuan deposit semua hasil yang terhutang di bawah kontrak-kontrak tersebut. Plaintif juga telah memberi kuasa kepada bank untuk membuka satu akaun deposit tetap di mana 8% daripada hasil bersih kontrak-kontrak tersebut akan didepositkan. Sarawak Cable Bhd ('SCB'), yang pada asalnya merupakan pemegang saham tunggal plaintif, telah menandatangani satu surat jaminan terhadap bank, sekaligus menjadi pihak sekuriti di bawah perjanjian kemudahan tersebut. Pada bulan September 2022, SCB dan enam anak syarikatnya, termasuk plaintif, telah memohon kepada Mahkamah Tinggi untuk kebenaran memanggil mesyuarat pemiutang bagi meluluskan satu skim pengaturan yang dicadangkan ('skim yang dicadangkan') serta bagi suatu perintah sekatan di bawah seksyen 366 dan 368 Akta Syarikat 2016. Plaintif kemudiannya telah dimaklumkan bahawa kejadian tersebut merupakan suatu peristiwa mungkir dan bahawa kemudahan tersebut akan digantung. Seterusnya, pihak-pihak telah mencapai persetujuan bahawa SCB akan mengeluarkan plaintif daripada skim yang dicadangkan tersebut. Pada sekitar bulan Disember 2023, Bilun Borneo Sdn Bhd ('BBSB') telah memperoleh keseluruhan kepentingan ekuiti dalam plaintif daripada SCB. Plaintif kemudiannya telah menulis kepada bank memohon pengesahan baki semasa yang disimpan dalam akaun escrow dan

akaun deposit tetap, pemprosesan segera pengeluaran dana, serta pelepasan dana dalam akaun escrow. Dalam surat tersebut, plaintif secara nyata memaklumkan kepada bank bahawa ia kini dimiliki sepenuhnya oleh BBSB dan telah terpisah sepenuhnya daripada SCB. Namun begitu, bank telah memaklumkan kepada plaintif bahawa kemudahan-kemudahan yang diberikan kepada plaintif (iaitu RCFL dan SCFL) telah dibatalkan serta-merta. Setelah pembatalan kemudahan tersebut, bank telah memaklumkan kepada plaintif bahawa walaupun kemudahan telah dibatalkan, bank berhak untuk mengekalkan baki yang dipegang dalam akaun escrow dan akaun deposit tetap selaras dengan seksyen 16.04 perjanjian kemudahan tersebut. Bank mendakwa bahawa memandangkan SCB merupakan pihak sekuriti kepada kemudahan tersebut, akaun-akaun plaintif akan disatukan dan/atau digabungkan menurut seksyen 16.04(b) perjanjian kemudahan tersebut untuk ditolak bagi sebahagian pelunasan liabiliti SCB sebagai penjamin bagi kemudahan yang diperoleh oleh Leader Cable Industry Bhd ('LCIB') dan Universal Cable (Sarawak) Sdn Bhd ('UCSSB'). Plaintif turut dimaklumkan bahawa terdapat sejumlah RM2,959,218.09 dan RM1,596,584.07 masing-masing dalam akaun escrow dan akaun deposit tetap ('wang-wang plaintif'). Plaintif kemudiannya telah memfailkan saman pemula ('SP') semasa bagi mendapatkan suatu deklarasi bahawa ia berhak kepada segala hak dan kepentingan dalam wang-wang plaintif atas alasan, antara lain, bahawa: (a) pengekalan dana oleh Bank adalah tidak sah berikutan pembatalan kemudahan oleh bank; dan (b) plaintif tidak mempunyai apa-apa liabiliti tertunggak kepada bank pada masa pembatalan; dan (c) pemilikan plaintif telah berubah daripada SCB yang mengalami kesukaran kewangan kepada BBSB, sekaligus memutuskan segala hubungan dengan penjamin asal. Isu-isu yang timbul untuk ditentukan: (i) sama ada pembatalan kemudahan oleh bank telah menamatkan perjanjian kemudahan tersebut secara berkesan, melepaskan semua tanggungjawab masa hadapan pihak-pihak; (ii) sama ada seksyen 16.04 perjanjian kemudahan, yang memperuntukkan hak penyatuan dan set off, kekal berkuat kuasa selepas pembatalan kemudahan; dan (iii) sama ada wujud peristiwa mungkir yang melayakkan bank untuk melaksanakan hak-haknya di bawah seksyen 16.04 perjanjian kemudahan selepas pembatalan kemudahan.

Diputuskan, membenarkan saman pemula plaintif:

(1) Surat daripada bank dengan jelas menyatakan bahawa 'semua kemudahan yang diberikan kepada Trenergy Infrastructure Sdn Bhd telah dibatalkan serta-merta'. Percubaan bank untuk membezakan antara pembatalan kemudahan dan penamatan perjanjian kemudahan, dengan hujahan bahawa perjanjian asas kekal berkuat kuasa, adalah bersifat artifisial dan tidak mempunyai merit substantif. Surat tersebut tidak mengandungi apa-apa pengekalan hak berterusan di bawah perjanjian kemudahan, dan tidak menunjukkan bahawa sebarang tanggungjawab

akan terus wujud selepas pembatalan. Tafsiran literal terhadap surat pembatalan tersebut, apabila dibaca bersama surat-menyurat terdahulu bank yang bersetuju untuk mengeluarkan plaintif daripada prosiding skim yang dicadangkan, menunjukkan suatu pemutusan hubungan perbankan sepenuhnya dan bukannya penamatan terpilih yang mengekalkan hak-hak kontrak tertentu (lihat perenggan 30).

(2) Tujuan utama perjanjian kemudahan ialah untuk menyediakan kemudahan pembiayaan kepada plaintif. Setelah bank membatalkan kemudahan tersebut, asas utama perjanjian itu tidak lagi wujud. Ia adalah tidak munasabah dari segi komersial untuk mengatakan bahawa perjanjian kemudahan terus wujud tanpa kemudahan yang menjadi subjek utamanya. Oleh itu, pembatalan kemudahan oleh bank telah dengan berkesan menamatkan perjanjian kemudahan dan melepaskan semua tanggungjawab masa hadapan pihak-pihak, termasuk hak penyatuan dan set off di bawah seksyen 16.04 perjanjian kemudahan (lihat perenggan 36 & 38).

(3) Seksyen 16.04 tidak direka untuk mencegah pengayaan tidak adil akibat pembatalan transaksi asas, sebaliknya ia merupakan peruntukan sekuriti yang membolehkan bank menyatukan akaun dan menolak liabiliti. Peruntukan ini terikat secara langsung dengan kesinambungan operasi hubungan pembiayaan dan penyediaan kemudahan perbankan yang berterusan. Setelah kemudahan tersebut dibatalkan, hubungan operasi itu terhenti dan peruntukan tersebut hilang tujuannya. Dalam hal ini, bank telah cuba menggunakan seksyen 16.04 bukan untuk menjamin tanggungjawab plaintif sendiri, tetapi untuk menjamin tanggungjawab SCB berhubung kemudahan yang diberikan kepada syarikat-syarikat lain (LCIB dan UCSSB). Maka, pergantungan bank kepada seksyen 16.04 perjanjian kemudahan adalah tidak berasas (lihat perenggan 49 & 51).

(4) Walaupun seksyen 16.02 memperuntukkan bahawa sekuriti, liabiliti dan tanggungjawab yang diwujudkan oleh perjanjian hendaklah terus sah dan mengikat walauapapun perubahan yang menjejaskan peminjam atau pihak sekuriti, peruntukan ini bertujuan memastikan bahawa perubahan dalam nama, bentuk, perlembagaan atau komposisi peminjam tidak menjejaskan sekuriti yang diwujudkan. Ia tidak menangani keadaan di mana bank sendiri telah membatalkan kemudahan tersebut. Oleh itu, seksyen 16.04 perjanjian kemudahan tidak terus berkuat kuasa selepas pembatalan kemudahan kerana ia terikat secara langsung kepada pelaksanaan tanggungjawab di bawah perjanjian tersebut (lihat perenggan 52–53).

(5) Sekalipun perubahan dalam pegangan saham merupakan suatu peristiwa mungkir, pembatalan kemudahan oleh bank merupakan tindak balas sepenuhnya terhadap mungkir tersebut, dan dengan berkesan telah

menamatkan perjanjian kemudahan. Setelah mengambil langkah ini, bank tidak boleh kemudiannya melaksanakan hak di bawah perjanjian yang telah ditamatkannya sendiri. Oleh itu, tidak terdapat sebarang peristiwa mungkir yang sah yang membolehkan bank melaksanakan haknya di bawah seksyen 16.04 perjanjian kemudahan selepas pembatalan kemudahan (lihat perenggan 65–66).

(6) Tujuan utama perjanjian kemudahan ialah untuk menyediakan kemudahan pembiayaan kepada plaintif. Semua peruntukan lain, termasuk seksyen 16.04, adalah bersifat sampingan kepada tujuan utama ini. Seksyen 16.04 tidak boleh ditafsirkan secara munasabah sebagai bertujuan untuk mewujudkan sekuriti tanpa had masa bagi liabiliti pihak ketiga yang tidak berkaitan setelah kontrak utama ditamatkan oleh tindakan bank sendiri yang membatalkan kemudahan tersebut. Tafsiran sedemikian akan menjadikan seksyen 16.04 sebagai klausa kekal, boleh dikuatkuasakan bertahun-tahun atau bahkan beberapa dekad selepas pembatalan kemudahan, selagi SCB masih berhutang kepada bank dalam apa juga kapasiti. Tafsiran sedemikian tidak mempunyai asas komersial dan akan membawa kepada kemustahilan komersial (lihat perenggan 70–73).

(7) Ia adalah hanya selepas pembatalan kemudahan barulah bank cuba melaksanakan haknya di bawah seksyen 16.04. Urutan peristiwa ini menunjukkan bahawa bank sendiri pada asalnya tidak menganggap seksyen 16.04 sebagai berkuat kuasa selepas pembatalan kemudahan. Tindakan bank adalah tidak konsisten dengan pendiriannya kini bahawa seksyen 16.04 kekal berkuat kuasa selepas pembatalan kemudahan dan boleh dikuatkuasakan berhubung liabiliti tidak berkaitan milik SCB. Oleh itu, kelakuan pihak-pihak menyokong kesimpulan bahawa seksyen 16.04 perjanjian kemudahan tidak terus berkuat kuasa selepas pembatalan kemudahan, khususnya bagi tujuan seperti yang didakwa oleh bank (lihat perenggan 84–86).]

Cases referred to

AIA International Limited (formerly known as American International Assurance Company (Bermuda) Limited) v Lee Hoi Yee [2013] HKCU 2473 (distd)

CIMB Bank Bhd v Maybank Trustees Bhd and other appeals [2014] 3 MLJ 169; [2014] 3 CLJ 1, FC (refd)

Dato' Sivananthan a/l Shanmugam v Artisan Fokus Sdn Bhd [2016] 3 MLJ 122; [2015] 2 CLJ 1062, CA (refd)

Fully Profit (Asia) Ltd v Secretary for Justice [2013] 6 HKC 374 (refd)

Heyman & Anor v Darwins Ltd [1942] AC 356, HL (refd)

Hong Leong Assurance Berhad v Ling Yu Kian Leong [2022] MLJU 3387, HC (refd)

Hong Leong Bank Bhd v BTS Buildtrade Supply Sdn Bhd & Ors [2022] MLJU 3774, HC (distd)

Investors Compensation Scheme Ltd v West Bromwich Building Society and Same and Hopkins & Sons (a firm) [1998] 1 WLR 896, HL (refd)
Johnson v Agnew [1980] AC 367, HL (refd)
LEC Contractors (M) Sdn Bhd v Castle Inn Sdn Bhd (No 2) [2001] 5 MLJ 510, HC (refd)
Morello Sdn Bhd v Jaques (International) Sdn Bhd [1995] 1 MLJ 577, FC (refd)
Spar Shipping AS v Grand China Logistics Holding (Group) Co Ltd [2015] 1 All ER (Comm) 879, QBD (refd)
Tahan Steel Corp Sdn Bhd v Bank Islam Malaysia Bhd [2012] 2 MLJ 314, CA (refd)
Yip Chee Seng & Sons Sdn Bhd v Orna Construction Corporation Sdn Bhd [1998] MLJU 93, HC (refd)

Legislation referred to

Companies Act 2016 ss 366, 368

Celinne Teh (Haris Ibrahim Kandiah Partnership) for the plaintiff.
Karen Tan (Skrine) for the defendant.

Atan Mustaffa J:

INTRODUCTION

[1] Before the court is an originating summons dated 3 September 2024 filed by the plaintiff, Trenergy Infrastructure Sdn Bhd, seeking a declaration that it is entitled to all rights and interests in funds held by the defendant, Hong Leong Bank Bhd, in fixed deposit accounts and an escrow account established pursuant to a facilities agreement dated 15 April 2021.

[2] After careful consideration of the affidavits, written submissions, and oral arguments of both parties, I find in favour of the plaintiff for the reasons set out below.

BACKGROUND FACTS

[3] The plaintiff and the defendant entered into a facilities agreement dated 15 April 2021 ('the facilities agreement') whereby the defendant granted the plaintiff banking facilities comprising a revolving contract financing line ('RCFL') in the total sum of RM34,550,000 and a specific contract financing line ('SCFL') in the sum of RM34,211,000 under the sublimit of the RCFL.

[4] The RCFL was utilised by the plaintiff as a general credit financing line, whereas the SCFL was utilised for specific contracts with Tenaga Nasional Bhd, particularly Contract TNB517/2016 variation orders No 3 and No 4 ('the contracts').

[5] Pursuant to the terms of the facilities agreement, the plaintiff authorised the defendant to open an escrow account in the plaintiff's name for the deposit of all proceeds due under the contracts. The plaintiff also authorised the defendant to open a fixed deposit account where 8% of the net proceeds of the contracts would be deposited.

[6] Sarawak Cable Bhd ('SCB') was initially the sole shareholder of the plaintiff and executed a letter of guarantee dated 15 April 2021 in favour of the defendant, thus becoming a security party under the facilities agreement.

[7] In September 2022, SCB and six subsidiaries, including the plaintiff, applied to the High Court of Sabah and Sarawak at Kuching in Originating Summons No KCH-24NCC-1–9 of 2022 for leave to convene a meeting of creditors to approve a proposed scheme of arrangement ('proposed scheme') and for a restraining order under ss 366 and 368 of the Companies Act 2016.

[8] By letter dated 11 October 2022, the defendant's solicitors, Messrs Skrine, informed the plaintiff that this event constituted an event of default, and that the facility would be suspended.

[9] Through correspondence in 2023, the parties reached an agreement where SCB would remove the plaintiff from the proposed scheme. On 20 June 2023, Messrs Krish Maniam & Co (solicitors for SCB) wrote to Skrine to inform that SCB intended to remove the plaintiff from the proposed scheme of arrangement. On 7 July 2023, Skrine replied to confirm that the defendant agreed to the plaintiff being removed from the proposed scheme proceedings.

[10] Sometime in December 2023, Bilun Borneo Sdn Bhd ('BBSB') acquired the entire equity interest in the plaintiff from SCB.

[11] On 29 February 2024, the plaintiff wrote to the defendant requesting confirmation of the current balance held in the escrow account and fixed deposit accounts, immediate processing of the withdrawal of funds, and release of funds in the escrow account. In this letter, the plaintiff explicitly informed the defendant that it was now wholly owned by BBSB and had 'completely departed from Sarawak Cable Group of Companies.'

[12] On 5 March 2024, the defendant replied by informing the plaintiff that the facilities granted to the plaintiff (ie, the RCFL and SCFL) were cancelled with immediate effect.

[13] Following the cancellation of facilities, on 21 March 2024, the defendant's solicitors informed the plaintiff that despite the cancellation, the

defendant was purportedly entitled to retain the balance held in the escrow account and fixed deposit accounts pursuant to section 16.04 of the facilities agreement. The defendant claimed that since SCB was a security party to the facility, the plaintiff's accounts would be consolidated and/or merged pursuant to section 16.04(b) of the facilities agreement to be set off towards part satisfaction of SCB's liabilities as guarantor for facilities obtained by Leader Cable Industry Bhd ('LCIB') and Universal Cable (Sarawak) Sdn Bhd ('UCSSB').

[14] The plaintiff was informed that there were sums of RM2,959,218.09 and RM1,596,584.07 in the escrow and fixed deposit accounts respectively (collectively 'the plaintiff's monies').

[15] The plaintiff subsequently filed the present originating summons seeking a declaration that it is entitled to all rights and interests in the plaintiff's monies.

THE ORIGINATING SUMMONS

[16] The plaintiff filed the originating summons on 3 September 2024 seeking declaratory relief regarding the plaintiff's monies — approximately RM4.5m held by the defendant in various accounts. The primary relief sought was a declaration that the plaintiff was entitled to all rights and interests in monies (including accrued interest) held by the bank in fixed deposit accounts No 33168034949 and No 33168035381, as well as in the escrow account, all established pursuant to a facilities agreement dated 15 April 2021. Additionally, the plaintiff sought an order requiring the defendant to account for all such monies within 14 days, together with costs and further relief as the court deemed fit. The originating summons included several alternative formulations of the same relief covering different combinations of the disputed accounts.

[17] The grounds for the originating summons centred on the plaintiff's contention that the defendant's retention of the funds was unlawful following the bank's cancellation of facilities on 5 March 2024. The plaintiff argued that after the facilities were cancelled, all future obligations under the facilities agreement were discharged, including the defendant's right to consolidate and set off under section 16.04 of the agreement. The plaintiff emphasised that it had no outstanding liabilities to the bank at the time of cancellation and that its ownership had changed from the financially distressed SCB to BBSB in December 2023, effectively severing all connections to the original guarantor. The plaintiff contended that the defendant's attempt to consolidate its accounts with the liabilities of SCB (as guarantor for other unrelated companies) after facility cancellation was in bad faith, unlawful, and amounted

to an improper attempt to enforce a contractual provision that could no longer survive the termination of the underlying commercial relationship.

RESPECTIVE PARTIES' SUBMISSIONS

The plaintiff's submissions

[18] The plaintiff contends that upon cancellation of the facilities by the defendant on 5 March 2024, all future obligations under the facilities agreement were discharged. The plaintiff submits that the right of consolidation and set off under section 16.04 of the facilities agreement is a right tied to the performance of the contract and does not survive the cancellation of the facilities.

[19] The plaintiff argues that once the facilities were cancelled, there was effectively no agreement between the parties, as the subject matter of the agreement (the provision of financing facilities) had ceased to exist. The plaintiff submits that there is no meaningful distinction between the cancellation of facilities and the cancellation of the facilities agreement.

[20] The plaintiff further contends that the defendant's attempt to enforce section 16.04 after cancelling the facilities would render it a perpetual clause, enforceable indefinitely, which could not have been the intention of the parties.

[21] The plaintiff also highlights that it had no outstanding obligations to the defendant at the time of cancellation, and that it had disclosed its change in shareholding to BBSB in its letter dated 29 February 2024, which the defendant did not treat as an event of default in its immediate response.

The defendant's submissions

[22] The defendant submits that there is a crucial distinction between the termination of facilities and the termination of the facilities agreement. It argues that while it cancelled the facilities, the facilities agreement remained in force, and its terms, including section 16.04, continued to be binding on the parties.

[23] The defendant contends that section 16.04 of the facilities agreement clearly entitles it to combine, consolidate, or merge the plaintiff's accounts with any liabilities of security parties and set off any sums towards satisfaction of those liabilities. It argues that SCB, as a corporate guarantor, is a security party under the facilities agreement and remains indebted to the defendant as a guarantor for facilities granted to LCIB and UCSSB.

[24] The defendant further submits that several events of default occurred, including the plaintiff's involvement in the scheme proceedings and the change in the plaintiff's shareholding to BBSB without the defendant's consent, which allegedly constitutes an event of default under section 12.01(x)(ii) of the facilities agreement.

ANALYSIS AND FINDINGS OF THE COURT

The legal effect of cancellation of facilities

[25] The plaintiff submits that the defendant's cancellation of facilities on 5 March 2024 effectively terminated the facilities agreement, discharging all future obligations between the parties. The plaintiff argues that there is no meaningful distinction between cancellation of facilities and cancellation of the facilities agreement, as the agreement's subject matter was the provision of the facilities themselves. According to the plaintiff, when the defendant unilaterally cancelled the financing facilities, it effectively rendered the facilities agreement void of its essential purpose and commercial basis. The plaintiff contends that a facilities agreement without the actual facilities is merely an empty shell, lacking any substantive content or operational significance.

[26] The plaintiff further argues that the cancellation of facilities constitutes a fundamental breach or termination of the contractual relationship, which should discharge all ongoing obligations under the agreement, including section 16.04's consolidation and set off provisions. The plaintiff submits that allowing the defendant to maintain rights under a cancelled agreement would create an artificial and commercially unreasonable distinction that was never contemplated by the parties.

[27] The defendant contends that there is a material distinction between cancellation of facilities and termination of the facilities agreement. It argues that while it cancelled the facilities, the facilities agreement remained in force, and its terms, including section 16.04, continued to be binding on the parties. The defendant particularly relies on section 16.04 of the facilities agreement, which provides:

> SECTION 16.04 CONSOLIDATION AND RIGHT OF SET OFF
>
> (a) It is hereby expressly agreed and declared that, unless the Lender otherwise agrees, the security created hereunder or any security whether given now or hereafter or from time to time shall not be discharged or released except on payment of not only all monies secured hereby but also all monies whatsoever or howsoever owing or payable or due from the Borrower(s) and/or the Securities Parties to the Lender (whether such liability be present, future, actual, contingent, primary, secondary, collateral, secured or unsecured, several or joint) under any account or accounts of

whatsoever nature (whether current, deposit or loan account), agreement or contract or otherwise with the Lender.

(b) Without prejudice to any other remedies which the Lender may have, the Lender may at any time or from time to time at its discretion by providing seven (7) days' notice to the Borrower, combine, consolidate or merge all or any of the Borrower(s)' and/or the Security Parties' account or accounts of whatsoever nature (whether current, deposit or loan account), at any branch of the Lender with any liabilities of the Borrower(s) and/or the Security Parties (whether such liability be present, future, actual, contingent, primary, secondary, collateral, secured or unsecured, several or joint) under any account (whether current, deposit or loan account), agreement (including under this Agreement), or contract or otherwise with the Lender and set off or transfer any sum (whether in the same or different currencies) standing to the credit of any such account, agreement or contract in or towards the satisfaction of any of the Borrower(s)' and/or the Security Parties' liabilities to the Lender under this Agreement and the Security Documents or under any account or accounts of whatsoever nature (whether current, deposit or loan account), agreements or contracts or otherwise (whether such liability be present, future, actual, contingent, primary, secondary, collateral, secured or unsecured, several or joint) with written notice to the Borrower and the Borrower(s) hereby expressly covenants that all liabilities of the Borrower(s) after such consolidation shall also be secured by this Agreement and the Security Documents.

[28] The defendant submits that this provision expressly contemplates the retention of securities and the exercise of consolidation rights in respect of liabilities of security parties 'under any account or accounts of whatsoever nature' with the lender, regardless of whether the specific facilities granted to the Borrower remain active. The defendant argues that section 16.04(a) specifically states that securities 'shall not be discharged or released except on payment of not only all monies secured hereby but also all monies whatsoever ... owing or payable or due from ... the Securities Parties to the Lender' and that this creates a continuing obligation that survives the cancellation of the particular facilities granted to the plaintiff. Furthermore, the defendant contends that section 16.04(b) grants it the discretionary right to consolidate accounts and set off sums 'at any time or from time to time' without any qualification that this right is dependent on the continued existence of the facilities themselves.

[29] The fundamental question before this court is whether the defendant's cancellation of the facilities on 5 March 2024 effectively terminated the facilities agreement, thereby discharging all future obligations of the parties.

[30] The letter from the defendant dated 5 March 2024 explicitly stated that 'all the facilities granted to Trenergy Infrastructure Sdn Bhd have been

cancelled with immediate effect'. The letter referenced the defendant's earlier letter of offer and supplementary letter of offer dated 1 March 2021, as well as correspondence from Messrs Skrine dated 11 October 2022. While the defendant attempts to draw a distinction between cancellation of facilities and termination of the facilities agreement, arguing that the underlying agreement remained in force, I find this distinction artificial and without substantive merit in the context of this case. The letter made no reservation of any continuing rights under the facilities agreement, nor did it suggest that any obligations would survive the cancellation. A plain reading of the cancellation letter, when considered alongside the defendant's earlier correspondence agreeing to remove the plaintiff from the proposed scheme proceedings, indicates a complete severance of the banking relationship rather than a selective termination that would preserve certain contractual rights.

[31] In *LEC Contractors (M) Sdn Bhd v Castle Inn Sdn Bhd (No 2)* [2001] 5 MLJ 510, as cited by the plaintiff, the High Court referred to P Ramanatha Aiyar's *The Law Lexicon* (Reprinted 1987 Ed), at p 1117, which states that 'to rescind is to abrogate, annul, avoid or cancel a contract'. This supports the position that cancellation of the facilities effectively amounted to cancellation of the facilities agreement.

[32] The Federal Court in *Morello Sdn Bhd v Jaques (International) Sdn Bhd* [1995] 1 MLJ 577 recognised and endorsed what was said by the House of Lords in *Johnson v Agnew* [1980] AC 367, that 'on rescission only future obligations come to an end ...'. In *Morello*, the Federal Court established that 'the effect in law of the contractual obligation to pay a deposit is to vest an indubitable right in the vendor to receive the deposit upon the contract coming into existence notwithstanding subsequent termination'. The court further held that 'in such a situation, the rights and obligations of the parties so far as the future is concerned are discharged but those previously vested or incurred, as the case may be, remain untouched'. Applying this principle, the plaintiff correctly submits that any agreement to merge and consolidate is no longer enforceable after the obligations of parties have been discharged, and that 'the defendant's enforcement of Clause 16.04 of the Facility Agreement after the cancellation of the Facilities is untenable'. This principle is directly applicable here, where the defendant's cancellation of the facilities discharged all future obligations of the parties.

[33] The English case of *Spar Shipping AS v Grand China Logistics Holding (Group) Co Ltd* [2015] 1 All ER (Comm) 879, also cited by the plaintiff, held that 'if there has been no repudiatory breach or renunciation, the option to cancel does not confer a right to damages, in the absence of clear language to the contrary, but merely confers a right to put an end to future performance obligations'. This further supports the position that the cancellation of the

facilities put an end to future performance obligations under the facilities agreement.

[34] The Court of Appeal case in *Tahan Steel Corp Sdn Bhd v Bank Islam Malaysia Bhd* [2012] 2 MLJ 314, as cited by the plaintiff, held that:

> it is settled principle that once a contract is lawfully terminated the contract comes to an end and parties are absolved from all future obligations.

[35] The defendant cites *CIMB Bank Bhd v Maybank Trustees Bhd and other appeals* [2014] 3 MLJ 169; [2014] 3 CLJ 1 (FC) and *Dato' Sivananthan a/l Shanmugam v Artisan Fokus Sdn Bhd* [2016] 3 MLJ 122; [2015] 2 CLJ 1062 (CA) to argue that parties are bound by the terms they have expressly agreed upon and that the court has a duty to defend, protect and uphold the sanctity of contracts. While I agree with these general principles, they must be applied within the context of contract law principles regarding termination or cancellation.

[36] In the present case, the facilities agreement's primary purpose was to provide financing facilities to the plaintiff. Once the defendant cancelled these facilities, the fundamental basis of the agreement ceased to exist. It would be commercially absurd to suggest that the facilities agreement continued to exist without the facilities that were its very subject matter.

[37] The defendant's reliance on my earlier decision in *Hong Leong Bank Bhd v BTS Buildtrade Supply Sdn Bhd & Ors* [2022] MLJU 3774 (HC) is distinguishable on multiple grounds. In that case, Hong Leong Bank sued BTS Buildtrade Supply Sdn Bhd (first defendant) and its guarantors to recover outstanding sums under two separate facilities: facilities granted directly to BTS Buildtrade, and facilities granted to BTS Construction Sdn Bhd (BTSC) for which BTS Buildtrade was a corporate guarantor. I granted summary judgment to the bank, upholding its right to consolidate. However, the factual circumstances and legal context in *BTS Buildtrade* differ substantially from the present matter:

(a) in *BTS Buildtrade*, the consolidation involved accounts of the same borrower (first defendant) who had defaulted on two separate facilities, and the accounts of a borrower (BTSC) for whom the first defendant was a corporate guarantor. In our case, there was no default by the plaintiff, and the defendant is attempting to exercise the right of consolidation in relation to liabilities of a security party (SCB) for completely unrelated companies (LCIB and UCSSB);

(b) in *BTS Buildtrade*, the consolidation was exercised while the facilities were still active, whereas in our case, the defendant had already cancelled the facilities before attempting to exercise the consolidation right;

(c) in *BTS Buildtrade*, the borrower (first defendant) was still a corporate guarantor of BTSC at the time of consolidation. In our case, the plaintiff was no longer owned by or connected to SCB, having been acquired by BBSB;

(d) the consolidation in *BTS Buildtrade* satisfied the requirement under cl 15.04(a) of the charge that 'the Security Parties to the Lender (whether such liability be present, future, actual, contingent, primary, secondary, collateral, secured or unsecured, several or joint) under any account or accounts of whatsoever nature, agreement or contract or otherwise with the Lender'. This was because the first defendant was directly a security party under both facilities. In our case, the plaintiff itself is not a security party to the facilities granted to LCIB and UCSSB; and

(e) most importantly, the facilities in *BTS Buildtrade* had not been cancelled by the bank. The bank was exercising its consolidation rights as part of enforcement action for defaulted facilities. The issue of survivability of the consolidation clause post-cancellation was never considered.

[38] I therefore find that the defendant's cancellation of facilities on 5 March 2024 effectively terminated the facilities agreement and discharged all future obligations of the parties, including the right of consolidation and set off under section 16.04.

Survivability of section 16.04 post-cancellation

[39] The plaintiff argues that section 16.04 of the facilities agreement is a term related to the performance of the contract, specifically tied to the provision of financing facilities, and therefore does not survive post-cancellation. The plaintiff draws a distinction between arbitration clauses (which survive termination) and other contract clauses like section 16.04.

[40] The defendant contends that section 16.04 is a security provision that is not directly tied to the performance of the contract and should survive even after the cancellation of facilities. The defendant also relies on section 16.02 of the facilities agreement, which states that securities, liabilities, and obligations created by the agreement shall continue to be valid and binding for all purposes notwithstanding any change affecting the borrower.

[41] The question before this court is whether section 16.04 of the facilities agreement, which provides for the right of consolidation and set off, survives the cancellation of facilities.

[42] In *Yip Chee Seng & Sons Sdn Bhd v Orna Construction Corporation Sdn Bhd* [1998] MLJU 93, a construction contract dispute involving the building

of a golf course, the High Court considered the survivability of arbitration clauses after termination of the underlying contract. The defendant had terminated the agreement for alleged breach, but when disputes arose over payment claims totaling over RM3m, the defendant argued that the arbitration clause was no longer operative following termination. Augustine Paul JC (as he then was) analysed several cases including *Heyman & Anor v Darwins, Ltd* [1942] AC 356, where Viscount Simon LC and Lord Macmillan made a crucial distinction between arbitration clauses and ordinary clauses. The court in *Yip Chee Seng* noted:

> What is commonly called repudiation or total breach of contract, whether acquiesced in by the other party or not, does not abrogate the contract, though it may relieve the injured party of the duty of further fulfilling the obligations which, by the contract undertaken by the repudiating party, the contract is not put out of existence, though all further performance of the obligations undertaken by each party in favour of the other may cease. It survives for the purpose of measuring the claims arising out of the breach and the arbitration clause survives for determining the mode of settlement.

[43] This distinction is critical to our analysis. In *Yip Chee Seng*, where the plaintiff sought to refer post-termination claims to arbitration while the defendant resisted on grounds that the contract termination had rendered the arbitration clause inoperative, the learned judge concluded that 'the arbitration clause survives for the purpose of measuring the claims arising out of the breach as that is the mode of settling claims agreed by the parties in the event there is a dispute'. The survivability of arbitration clauses is an exception to the general rule that contractual obligations cease upon termination because arbitration clauses serve a specific procedural function rather than creating substantive obligations.

[44] By contrast, section 16.04 of the facilities agreement is not procedural but substantive in nature. It creates ongoing obligations directly tied to the operational performance of the contract. Unlike arbitration clauses which provide a mechanism for resolving disputes arising from the contract after termination, the consolidation and set off provision in section 16.04 is an active, operational aspect of the financing relationship.

[45] The plaintiff relies on the case of *AIA International Limited (formerly known as American International Assurance Company (Bermuda) Limited) v Lee Hoi Yee* [2013] HKCU 2473, as referenced in *Hong Leong Assurance Berhad v Ling Yu Kian Leong* [2022] MLJU 3387 (HC), to argue that contractual terms survive termination only based on their specific nature and the intention of the parties. A careful examination of both cases supports the plaintiff's position.

[46] In *AIA International*, the Hong Kong District Court considered whether an insurance commission clawback clause survived the termination of an agent's agreement. The clause provided: 'If the Company (AIA) shall refund the premium to the policyholder on any policy and cancel the policy for any reason whatsoever the Career Representative shall repay to the Company (AIA) on demand the amount of Commissions and Bonuses received on the premiums so refunded'. Judge Kent Yee held that this clause survived termination, stating at para 24:

> It is plain that AIA depends on its agents to procure business and hence make profits out of concluded insurance policies. Its agents are entitled to share the fruits by earning commissions with reference to such profitable businesses procured by them. In the event that the businesses so procured by way of insurance policies have to be cancelled and refund has to be made to those policyholders, AIA cannot reap any profits from such aborted businesses. It follows that no fruits can be shared with its agents out of such aborted businesses and the agents should refund any commissions previously received to AIA.

[47] Similarly, in *Hong Leong Assurance*, Ong Chee Kwan J analysed a commission clawback provision in an insurance agency agreement. The court identified the specific rationale for clawback clauses in the insurance context, citing AIA International with approval. Justice Ong Chee Kwan found at para 57 that 'such claw back' clauses must survive the termination of an agent's or agency manager's agreement' for specific reasons:

> (a) to avoid instances where an agent retains unjust profit after resignation by adopting dubious or underhanded tactics to procure business for an insurer;
>
> (b) but for the survival of such 'claw back' clauses, an agent would be entitled to retain commissions even when a policy was rightly rescinded due to an agent's own faults such as misrepresentation;
>
> (c) to avoid the possibility of any collusion between an agent and a policyholder which causes loss to an insurer; and
>
> (d) the existence and survival of such a clause is necessary to protect the legitimate interests of an insurer.

[48] The cases demonstrate that whether a contractual term survives termination depends on its specific nature, purpose, and the intention of the parties. While the courts in *AIA International* and *Hong Leong Assurance* held that commission clawback clauses survive termination, they did so based on the particular nature and function of such clauses in the insurance context. The claw back clauses in those cases prevent unjust enrichment where an agent has received commission for a policy that is subsequently cancelled with full premium refunded. Such situations nullify the very transaction from which the agent earned commission, creating a direct causal connection between the

agent's work, commission payment, and policy cancellation.

[49] By contrast, section 16.04 is not designed to prevent unjust enrichment arising from nullification of the underlying transaction. Rather, it is a security provision allowing the bank to consolidate accounts and set off liabilities. This provision is directly tied to the operational continuity of the financing relationship and the ongoing provision of banking facilities. Once those facilities were cancelled, the operational relationship ceased, and the provision lost its purpose.

[50] Furthermore, and crucially, the claw back clauses in *AIA International* and *Hong Leong Assurance* related directly to the specific transactions between the parties to the contract. In our case, the defendant seeks to apply section 16.04 not to secure the plaintiff's own obligations, but to secure obligations of SCB in respect of facilities granted to entirely different companies (LCIB and UCSSB). This goes well beyond the rationale for survival articulated in the insurance cases.

[51] The defendant's reliance on section 16.02 of the facilities agreement is also misplaced. Section 16.02 provides:

> SECTION 16.02 CHANGE IN BORROWER(S) OR SECURITY PARTIES
>
> (a) The securities, liabilities and/or obligations created by this Agreement shall continue to be valid and binding for all purposes whatsoever notwithstanding any change whether by reason of amalgamation, bankruptcy, death, insanity, incorporation, liquidation, reconstruction, winding up or otherwise howsoever in the name, style, constitution or composition of the Borrower(s) and/or Security Parties and it is expressly declared that no change of any sort whatsoever in relation to or affecting the Borrower(s) and/or Security Parties shall in any way affect the security liabilities and/or obligations created by this Agreement in relation to any transaction whatsoever whether past, present or future.
>
> (b) If the Borrower and/or Security Parties being a firm is dissolved by reason of the introduction of a further partner or partners into the firm or the death or retirement of any existing partners from the firm or the amalgamation of the firm with another firm or in consequence of a corporation taking over all the assets of the firm this Agreement and/or the Security Documents shall continue and in addition to the debts and liabilities of the old firm shall apply to all money and liabilities due or incurred to the Lender from or by the new firm or corporation as aforesaid thereby constituted as though there had been no change in the firm as previously constituted.

[52] While section 16.02 provides that securities, liabilities, and obligations created by the agreement shall continue to be valid and binding

notwithstanding any change affecting the borrower or security parties, this provision is aimed at ensuring that changes in the borrower's name, style, constitution, or composition do not affect the securities created. It does not address the situation where the defendant itself has cancelled the facilities.

[53] I therefore find that section 16.04 of the facilities agreement does not survive the cancellation of facilities, as it is directly tied to the performance obligations under the agreement.

Alleged events of default

[54] The defendant submits that several events of default occurred, including the plaintiff's involvement in the scheme proceedings and the change in the plaintiff's shareholding to BBSB without the defendant's consent, which allegedly constitutes an event of default under section 12.01(x)(ii) of the facilities agreement. Section 12.01(x)(ii) provides that an event of default occurs:

> if the Borrower or any of the Security Parties ceases or threatens to cease to carry on its business or if there is any change in the partners, major shareholders and/or management of the Borrower or any of the Security Parties.

[55] The plaintiff contends that it had no outstanding obligations to the defendant at the time of cancellation, and that it had disclosed its change in shareholding to BBSB in its letter dated 29 February 2024, which the defendant did not treat as an event of default in its immediate response.

[56] The first alleged event of default is the plaintiff's involvement in the scheme proceedings in September 2022. The defendant's letter dated 11 October 2022 explicitly stated that this constituted an event of default:

> In view of this material adverse development which constitutes an event of default under the security documents governing the Banking Facilities, we have instructions to inform you that all Banking Facilities granted to you by our Client shall be suspended with immediate effect pending our Client's review of the situation.

[57] However, the parties subsequently reached an agreement where the plaintiff would be removed from the proposed scheme. On 7 July 2023, the defendant, through its solicitors, explicitly agreed to the plaintiff being removed from the proposed scheme proceedings, stating:

> We have instructions to confirm that our Client, Hong Leong Bank Berhad (the only scheme creditor for Trenergey Infrastructure Sdn Bhd/6th Applicant) is agreeable to your clients' request to have the 6th Applicant removed from the proposed Scheme Proceedings.

[58] This agreement effectively waived any default arising from the plaintiff's initial involvement in the scheme proceedings.

[59] The second alleged event of default is the change in the plaintiff's shareholding from SCB to BBSB without the defendant's consent. The defendant relies on section 12.01(x)(ii) of the facilities agreement, which provides that an event of default occurs:

> if there is any change in the partners, major shareholders and/or management of the Borrower or any of the Security Parties.

[60] However, the plaintiff explicitly disclosed this change in shareholding to the defendant in its letter dated 29 February 2024, stating that 'TISB is now wholly owned by Bilun Borneo and therefore has completely departed from Sarawak Cable Group of Companies'. The defendant's response on 5 March 2024 did not treat this change in shareholding as an event of default; it simply cancelled the facilities without citing this as a reason.

[61] Furthermore, it was only in the defendant's letter dated 21 March 2024, more than two weeks after the cancellation of facilities, that the defendant attempted to exercise its rights under section 16.04. In that letter, the defendant's solicitors stated:

> We are also instructed to give you notice that pursuant to Section 16.04(b) of the Facilities Agreement, our client shall after 7 days of this letter, proceed to combine, consolidate and/or merge Trenergy's Accounts with the liabilities of Sarawak Cable Berhad under the Corporate Guarantees signed by Sarawak Cable Berhad in respect of the facilities granted to Leader Cable Industry Berhad and Universal Cable (Sarawak) Sdn Bhd and set off all monies held in the said accounts towards part satisfaction of the liabilities of Sarawak Cable Berhad to our client.

[62] The timing of this notice — coming more than two weeks after the cancellation and without any prior mention of consolidation rights in the immediate cancellation letter of 5 March 2024 — suggests that the defendant did not initially consider the change in shareholding as an event of default justifying the exercise of its rights under section 16.04.

[63] The letter also confirmed the defendant's position regarding the binding nature of the agreement despite the change in shareholding:

> The terms of the Facilities Agreement are binding on you regardless of any change in the shareholding or management of your company.

[64] However, notably, the letter did not cite the change in shareholding as constituting an event of default under section 12.01(x)(ii) of the facilities

agreement, instead focusing solely on SCB's continuing indebtedness as a security party in relation to other unrelated facilities granted to LCIB and UCSSB.

[65] Even if the change in shareholding did constitute an event of default, the defendant's cancellation of the facilities was a complete response to this default, effectively terminating the facilities agreement. Having taken this step, the defendant cannot then seek to exercise rights under the very agreement it has effectively terminated.

[66] I therefore find that there were no valid events of default that would entitle the defendant to exercise its rights under section 16.04 of the facilities agreement after the cancellation of facilities.

Commercial intent and purpose of the facilities agreement

[67] The plaintiff argues that the defendant's interpretation of section 16.04 would render it a perpetual clause, enforceable indefinitely, which could not have been the intention of the parties. The plaintiff contends that this interpretation lacks commercial sense.

[68] The defendant submits that section 16.04 is a security provision that protects the defendant's interests and should be interpreted according to its clear and unambiguous language, regardless of commercial considerations.

[69] In interpreting the facilities agreement, I must consider not only the literal meaning of its terms but also the commercial intent and purpose of the agreement as a whole.

[70] The primary purpose of the facilities agreement was to provide financing facilities to the plaintiff. All other provisions, including section 16.04, were ancillary to this primary purpose and should be interpreted in this context.

[71] If I were to accept the defendant's interpretation of section 16.04, it would mean that even after the defendant itself has cancelled the facilities and effectively terminated the agreement, it could still exercise rights under the agreement indefinitely. This would render section 16.04 a perpetual clause, enforceable years or even decades after the cancellation of facilities, as long as SCB remains indebted to the defendant in any capacity.

[72] Such an interpretation lacks commercial sense and could not have been the intention of the parties when they entered into the facilities agreement. The

facilities agreement was intended to govern the provision of financing facilities to the plaintiff, not to create a perpetual security for unrelated liabilities of third parties.

[73] Furthermore, the defendant's interpretation would lead to the commercially absurd result where the plaintiff, now owned by BBSB (an entity unrelated to SCB), would continue to be liable for SCB's debts indefinitely, despite no longer having any relationship with SCB.

[74] In *AIA International Limited*, Judge Kent Yee carefully analysed when contractual terms survive termination, stating at para 21:

> Whether a particular term can survive termination should be a matter of inference taking into account the nature of the term and the intention of the parties and not really to be decided with regard to how the contract is terminated absent express provisions.

[75] The court in *AIA International* further emphasised at para 22 that 'context is of cardinal importance to construction of contractual terms', adopting principles from *Fully Profit (Asia) Ltd v Secretary for Justice* [2013] 6 HKC 374 (FACV17/2012) and *Investors Compensation Scheme Ltd v West Bromwich Building Society and Same and Hopkins & Sons (a firm)* [1998] 1 WLR 896. The court examined 'the background of the Agreement and the commercial purpose of Clause 5 to find out whether it can survive the termination and thus is still enforceable'.

[76] Applying these principles to the present case, I must consider the specific nature of section 16.04 and the intention of the parties in the context of the facilities agreement as a whole. Unlike the claw back clause in *AIA International*, which served a clear commercial purpose of preventing unjust enrichment in a specific transaction between the contracting parties, section 16.04 cannot reasonably be interpreted as intending to create an indefinite security for unrelated third-party liabilities after the principal contract has been terminated by the defendant's own act of cancelling the facilities.

[77] This interpretation is further supported by Ong Chee Kwan J's analysis in *Hong Leong Assurance Bhd v Ling Yu Kian Leong*, where the court considered the fairness and commercial sense of contractual provisions. While upholding the specific claw back clause in that case, Justice Ong Chee Kwan recognised at para 85 that terms that allow a party 'to exercise it totally uninhibited and or at his whims and fancy' should be limited, noting that 'discretion must be exercised honestly and in good faith and must not be capriciously, arbitrarily or unreasonably'.

[78] I therefore find that the commercial intent and purpose of the facilities agreement do not support the defendant's interpretation of section 16.04 as a perpetual clause enforceable even after the cancellation of facilities.

Conduct of the parties

[79] The plaintiff highlights the conduct of the parties, particularly the correspondence between April and July 2023, where the defendant agreed to remove the plaintiff from the proposed scheme proceedings without any reservation of rights under section 16.04.

[80] The defendant contends that its conduct does not waive its rights under the facilities agreement, and that it was entitled to exercise its rights under section 16.04 upon the occurrence of events of default.

[81] The conduct of the parties is relevant to understanding their intentions and the proper interpretation of the facilities agreement.

[82] In the correspondence between April and July 2023, the defendant, through its solicitors, agreed to the plaintiff being removed from the proposed scheme proceedings. This agreement contained no reservation of rights under section 16.04 of the facilities agreement.

[83] Furthermore, when the plaintiff informed the defendant of the change in shareholding from SCB to BBSB in its letter dated 29 February 2024, stating that 'TISB is now wholly-owned by Bilun Borneo Sdn Bhd and therefore has completely departed from the Sarawak Cable Bhd's Group of Companies. As such, we believe that you have no rights whatsoever to retain the funds in the aforesaid escrow account and the fixed deposit accounts for whatever reasons' the defendant's immediate response was to cancel the facilities, not to exercise its rights under section 16.04.

[84] It was only after the cancellation of facilities, on 21 March 2024, that the defendant attempted to exercise its rights under section 16.04. This sequence of events suggests that the defendant itself did not initially consider section 16.04 to be operative after the cancellation of facilities.

[85] The defendant's conduct is inconsistent with its current position that section 16.04 survives the cancellation of facilities and can be enforced in relation to unrelated liabilities of SCB.

[86] I therefore find that the conduct of the parties supports the conclusion that section 16.04 of the facilities agreement does not survive the cancellation of facilities, especially not for the purpose claimed by the defendant.

CONCLUSION AND ORDER

[87] For the reasons stated above, I find that:

(a) the defendant's cancellation of facilities on 5 March 2024 effectively terminated the facilities agreement and discharged all future obligations of the parties, including the right of consolidation and set off under section 16.04;

(b) even if the facilities agreement continued to exist in some form after the cancellation of facilities, section 16.04 would not survive as it is directly tied to the performance obligations under the agreement, distinguishable from procedural clauses such as arbitration clauses that survive termination;

(c) contractual provisions that survive termination typically address specific transactions directly between the contracting parties to prevent unjust enrichment or unfairness. Section 16.04 cannot be reasonably extended to secure unrelated third-party obligations after the defendant's own cancellation of the facilities;

(d) the defendant's reliance on previous banking consolidation cases is misplaced as those cases involved fundamentally different circumstances where the facilities remained active and the consolidation involved direct relationships between the parties;

(e) there were no valid events of default that would entitle the defendant to exercise its rights under section 16.04 of the facilities agreement after the cancellation of facilities;

(f) the commercial intent and purpose of the facilities agreement do not support the defendant's interpretation of section 16.04 as a perpetual clause enforceable even after the cancellation of facilities; and

(g) the conduct of the parties supports the conclusion that section 16.04 of the facilities agreement does not survive the cancellation of facilities.

[88] Accordingly, the plaintiff's originating summons is allowed with the following orders:

(a) a declaration that the plaintiff is entitled to all rights and interests in all monies (including accrued interest) held by the defendant in the fixed deposit accounts and escrow account established pursuant to the facilities agreement dated 15 April 2021;

A (b) the defendant shall, within 14 days from the date of this order, account for all monies (including accrued interest) from the fixed deposit accounts and escrow account established pursuant to the facilities agreement dated 15 April 2021; and

B (c) costs of RM8,000 to be paid by the defendant to the plaintiff.

Appeal allowed.

Reported by K Selvaraju

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